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IN THE

Supreme Court of the United States

OCTOBER, 1932 TERM.

No. 14.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

RESPONDENT'S BRIEF.

GEORGE C. LEVIN,
Attorney for Respondent, Irving Trust Co., as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, bankrupt,
225 Broadway,
New York, N. Y.

SYDNEY KRAUSE,
GEORGE J. HIRSCH,
Of Counsel.

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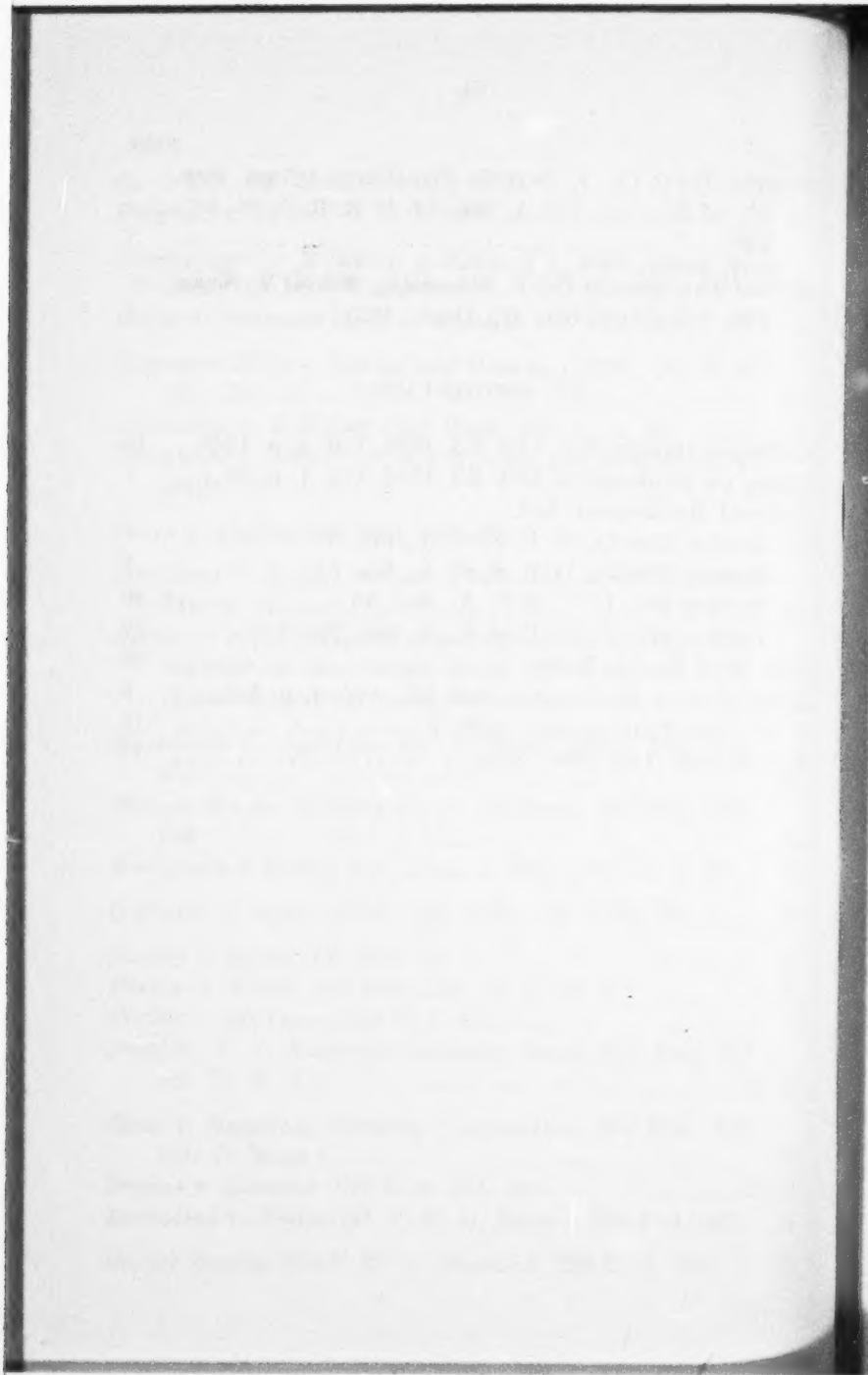

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Respondent.

RESPONDENT'S BRIEF.

Statement.

The points in issue involved in this appeal are twofold:

1. Upon the particular facts of this case did the reception in evidence of the bankrupt's schedules in bankruptcy constitute reversible error?

2. Upon those facts, were the defendants wrongfully deprived of a jury trial?

Petitioners, relatives of the bankrupt, Leonard H. Smith, are declared by the judgment under appeal to

have obtained voidable preferences under §60b* of the National Bankruptcy Act (11 U. S. C. A., Sec. 96) in the aggregate amount of $1,500 (R. 65, 66).

Pursuant to recent amendment to the Equity Rules of this Court, the Trial Judge made separate findings of fact and conclusions of law on all of the issues in the case (R. 64-66).

The disposition below was affirmed by the Circuit Court without opinion (54 F. (2d) 1079) by Manton, L. Hand, and Chase, *JJ.*

Bearing on the introduction of evidence of the schedules in bankruptcy, the opinion of the Trial Judge indicates that the insolvency of the bankrupt was abundantly established (quoting only the relevant portions, R. 57, 58):

> "Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoenthal, brother and sister, are cousins of the bankrupt.
>
> The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar * * *.
>
> Coming down to June, 1930, the month previous to the filing of the involuntary petition the

* "§60. *Preferred Creditors.*—b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, *it shall be voidable by the trustee* and he may recover the property or its value from such person."

bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent."

During the course of trial and at various stages thereof the petitioners in order to procure an adjournment made various motions, the denial of one of which is here assigned as error. The sincerity of these applications was commented upon as follows by the Trial Court (R. 14, fol. 22):

"I cannot help be impressed, but there is a very studied effort being made here to postpone the case. * * *.

That is the impression I have gained from having heard two or three different motions *at various times**, since I have been sitting in this Court, all of them with the idea of postponing the final hearing on this action. Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly" (R. 15).

* Italics throughout this brief, unless otherwise indicated, are the writer's.

POINT I.

The schedules in bankruptcy were properly received in evidence since the bankrupt took the witness stand, and if improperly received, merely constituted cumulative proof on the question of insolvency upon which petitioners offered no contradictory evidence.

The schedules in bankruptcy were received in evidence as bearing on the question of insolvency, it being incumbent upon the Trustee to establish this fact on the date of each transfer in suit. The preferential transfers were all made within the last month of the bankrupt's business existence, on June 9th, 11th and 19th, 1930.

Petitioners assert that the admission in evidence of the schedules constituted reversible error. The bankrupt was examined as a witness and testified that the schedules were correct (R. 29):

> "Q100. In June, 1930, what were your liabilities? A. This I couldn't tell you. You have a record there.
>
> Q101. You signed and swore to the schedules in bankruptcy in this case, did you not? A. Yes.
>
> Q102. Are your schedules correct? A. Positively.
>
> Q103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26? A. That is correct."

The petitioners were not deprived of the opportunity of cross examination. Furthermore the trustee had available in court the bankrupt's books of account (R. 38). The petitioners were at liberty to employ these books if it was their contention that they establish that the bankrupt suddenly became insolvent.

The involuntary petition in this case was filed July 10th, 1930 (R. 3). All of the transfers in suit were made within a month prior to the petition. The bankrupt testified that when the end came, he had a bank balance of $250.11 (R. 30, 60) available for liabilities of $18,900.26 (R. 29).

There remained however fixed assets of the scheduled value of $15,953.88 which *included* the following: an unliquidated claim of $1,026.73 (R. 60) representing a salesman's overdrawals, and regarded as uncollectible (R. 30); a merchandise inventory of $3,624.88 (R. 60) which had depreciated (R. 22, 29, 30); and a fixed item of machinery and fixtures stated at $9,282.15, half of which was "three or four years old" and had depreciated in value (R. 30). From the above it was contended that the scheduled value was at least more than 50% of the actual value.

As against liabilities of $18,900.26, the trustee's balance available for creditors realized from all sources is $5,097.10 (R. 59).

The bankrupt testified that in the month of June business was dull, that he had very little cash on hand, and had a number of past due bills (R. 26).

In view of the foregoing, it is clear that no extraordinary improvement or substantial change was taking place in the bankrupt's financial affairs during the month of June to rebut the presumption that the bankrupt admittedly insolvent on the petition date was in the same condition the month preceding. Significantly the petitioners offered no contrary proof.

Wilmot Engineering Co. v. *Blanchard*, 203 N. Y. Supp. 700, 703 (App. Div. 4th Dept., 1924), quoting from the opinion of present Court of Appeals Judge Henry T. Kellogg:

"It does not appear that its insolvency came

about through some untoward happening within the 19 days. *Therefore, if it was insolvent on the 3d day of December, 1921, it was presumptively insolvent on the 14th day of November, 1921.*"

To the same effect see *In re Dix*, 267 Fed. 1016 (D. C. N. Y.), decided by Learned Hand, *C. J.*, while sitting as District Judge in the Northern District, holding that where insolvency is undisputed at the time of bankruptcy, it is *prima facie* proof of insolvency a month prior thereto.

Petitioners cite numerous authorities relative to the admissibility of schedules, in some of which the bankrupt did not take the witness stand. *Grant* v. *National Bank of Auburn*, 197 Fed. 581 (see Brief, p. 21) arose on a demurrer to the complaint before trial and is, therefore, distinguishable since the bankrupt was a witness in the instant case.

The trial court found that insolvency was clearly established (R. 58, fol. 76):

> "Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent. to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent. of his liabilities."

It is submitted that the Trustee need not in every case burden the estate with the expense of engaging an accountant to interpret the books and records particularly where the insolvency alleged is so close to the petition. Moreover, as has been recognized, schedules are competent proof on the question of financial condition.

> "Upon this question (insolvency) it is proper to consider the condition of the bankrupt's estate as disclosed by the schedules in bankruptcy."

Lyttle v. *Fifth National Bank*, 39 A. B. R. 690, 693, affirmed by the circuit court, 250 Fed. 361, Rogers, *C. J.* (*certiorari* denied, 267 U. S. 506);

Collier on Bankruptcy, 13th Edition, 1923, Volume 1, page 26:

"The books of a bankrupt, *his schedules*, inventory, and appraisement are competent evidence upon the question of insolvency."

Upon principle it is submitted that filed schedules in bankruptcy should be received as some evidence on the issue. The court is mindful of the penalties which a bankrupt must suffer if the schedules are false, namely, that a false oath thereto will deprive the bankrupt of his discharge privilege (National Bankruptcy Act, §14b (1), 11 U. S. C. A., Sec. 32) and will also make him punishable by imprisonment (National Bankruptcy Act, §29b (2), 11 U. S. C. A., Sec. 52).

However, upon the facts of this case petitioners cannot complain because the bankrupt testified as to the accuracy of the schedules and an opportunity was afforded the defendants to cross-examine and develop that the schedules were false and inaccurate, and they also had access to the books of account to indicate a contrary state of facts, to establish which, no attempt was made.

Trenton Trust Co. v. *Carlise Fire Corp.* (Conn. Sup. Ct. of Errors), 147 A. 366, 14 A. B. R. N. S. 645, 648:

"The schedules in bankruptcy were admitted in evidence, apparently for the purpose of showing the amount of the liabilities of the defendant; but any error in that regard was obviated by the fact from the books of the company in evidence and other testimony liabilities to a greater amount

than those scheduled had already been shown, and the further fact that those appearing upon the books alone were in excess of the total value of the assets of the company as found by the court, so that we cannot regard the ruling as harmful."

Petitioners at page 21 stress the comment of Remington on the admissibility of schedules. That authority it is interesting to observe, however, lists a number of cases (Remington on Bankruptcy, 3rd ed., Vol. 4, page 517 as approving their reception in evidence (see §1755, footnote 18).

POINT II.

Assuming *arguendo* that petitioners were entitled to a trial by jury, such privilege may be and was upon the facts of this case effectively waived.

At the outset we deem it necessary to make mention of an error which appears in petitioner's brief in support of petition for certiorari at page 26 with respect to the facts of *Allen* v. *Gray,* 201 N. Y. 504. The petitioners cite this case for the following proposition, quoting from that brief (p. 26):

> "At the opening of the trial, *defendant* demanded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee *on the ground that defendant was entitled to a jury trial.*" (Italics ours.)

Reference to the case discloses that the demand for a jury trial was made by the *plaintiff* and not by defendant as is stated by petitioners.

We quote from *Allen* v. *Gray,* 201 N. Y. 504, at page 505:

> "The case was noticed for trial upon the calen-

dar for jury trials, but upon the defendants' motion was transferred to the Special Term calendar. It was thereafter brought on for trial before the court without a jury. At the opening of the trial the *plaintiff demanded a jury trial,* which was refused, and an exception was taken to the refusal."

In the case at bar with laudable ingenuity but questionable good faith *at the opening of the trial* and at frequent intervals during its progress the petitioners made the following formal motions all of which were denied:

1. For an adjournment because of the alleged illness of petitioner, Fannie R. Schoenthal (R. 12-15, 55).

2. For a jury trial (R. 15, 50).

3. For a severance of the actions because of alleged misjoinder of parties (R. 15, 16).

The denial of only the second of these motions is assigned as ground for review by this Court.

Issue was joined in the action at bar, in October, 1930 (R. 6) and under the rules of the District Court, in order to expedite the administration of bankrupt estates, was granted a preference because the plaintiff is a trustee in bankruptcy (R. 15, 16). The action appeared on the call calendar a number of times in February thereafter and was marked ready, and although one of the defendant's illness allegedly "has existed for nearly a year and still exists at the present time", no notice was given plaintiff, or any attempt made to take a deposition (R. 15, 55), nor was any claim made in defendant's answer for a jury trial:

"The Court: * * * counsel has not shown proper

diligence in getting the woman's testimony or her deposition. *I cannot help be impressed but there is a very studied effort being made here to postpone the case*" (R. 14). * * *

"That is the impression I have gained from having heard two or three motions, at various times, since I have been sitting in this court, all of them with the idea of postponing the final hearing on this action" (R. 14, 15).

The Trustee's position was thus stated to the District Court (R. 13):

"We are compelled to rely in these cases upon hostile witnesses and we have been met at point of trial with a motion to adjourn the action and a transfer from the equity calendar to the law side. Now, there is a question of good faith here, whether all these tactics are being adopted for the purpose of delay or actually for the purpose which the application recites."

The trial court properly admonished counsel (R. 15):

"Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly."

The above comment is equally applicable to the next motion which involved a demand for a jury trial. Assuming this application had merit, made returnable when the plaintiff was in court with witnesses prepared for trial and no objection being raised in defendant's answer, nor any claim made therein for a jury trial* (R. 6, 7),

* Not binding on this court, but indicative of the modern tendency is the legislative enactment declaring a jury trial waived unless promptly demanded. See N. Y. Civil Practice Act (Am'd L. 1927 ch. 696; L. 1929, ch. 196) §426, 5 * * * "If the plaintiff fails so to serve and file such notice demanding a jury trial * * * the action shall be placed on the calendar for the trial of actions without a jury, unless a jury trial *be demanded* (within twenty days) by another party to the action * * *."

the motion was properly denied on the following authorities on the ground that the defendants by their acts had waived their right, if any existed, to object.

> *Adams* v. *Clarke* (C. C. A. 9th) 22 F. (2d) 957, at page 958:
>
> "But however that may be, defendants did not present to the lower court their request for a transfer to the law side *until after the cause was actually called for trial* upon the equity calendar, and we think they thus waived such right, if any, as they may have had."

For an extended review of the authorities on the above proposition, see *Rosenthal* v. *Heller* (D. C. M. D., Penn.) 266 Fed. 563, relying upon decisions of this Court below noted:

> "To accomplish what plaintiff is here attempting could no doubt be accomplished by an action at law, and where such remedy is afforded a suit in equity will not be sustained, *unless waived by the parties.* The provisions of Section 723 of the Revised Statutes of the United States (Comp. St. §1244), that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant *which he may waive* (*Warmath* v. *O'Daniel,* 159 Fed. 87, 20 Am. Bankr. Rep. 101), either by actual consent (*Hicks* v. *Knost,* 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183), *or by acquiescence.* See *Hollins* v. *Brierfield Coal & Coke Co.,* 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; and *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021) where it was said by Justice Brewer:

> "* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that *"if a defendant in a suit in equity answers* and submits to the jurisdiction of the court, *it is too late for him to object* that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity".'
>
> The defendants having entered their defense upon the merits at large, *they have waived their right to a trial at law,* and their motion to dismiss will be denied."

For more recent holdings that the objection may be waived, see *Duignan* v. *U. S.,* 274 U. S. 195, and *Henrietta Mills* v. *Rutherford County* (1929), 281 U. S. 121, 128, relying on *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481, and *Reynes* v. *Dumont,* 130 U. S. 354, 395.

POINT III.

A bankruptcy preference inherently involves an equitable remedy and should be heard in equity.

Preference actions have been tried in equity in the Second Circuit for 25 years on the authority of *Parker* v. *Black,* 151 Fed. 18 and *Parker* v. *Sherman,* 212 Fed. 917, Lacombe, *J.*

The existing rule it is submitted should not be disturbed, since the trial of preference actions by juries would needlessly delay and add to the cost of bankruptcy administration, by prolonging trials, and would unneces-

sarily encumber the already heavily burdened civil jury trial calendars.

The average preference action involves small amounts. According to available statistics in the bulk of bankruptcy cases, the liabilities are under $5,000. To adopt the rule contended for by petitioners would result in a flood of jury cases in the Southern District of New York, where bankruptcies are more prevalent than any other federal district. The only limitation in a district where calendar congestion on the jury side is already acute, would be that the amount in suit exceed $20.00.

Such a departure unwelcome for practical reasons is unnecessary on principle.

Not long after the enactment of the Bankruptcy Act of 1898, Holt, *J.*, regarded as the "Father of the Bankruptcy Act", sitting in the Southern District of New York, made the following holding in 1903, relating to the precise issue at bar:

Pond v. *New York National Exchange Bank*, 124 Fed. 992 (S. D. N. Y.), at page 992:

> "This is a demurrer to a bill in equity filed to recover $16,000, paid by the bankrupt to the defendant, on the ground that it constituted a preference, prohibited by the bankruptcy act. * * * The only * * * grounds which require any consideration * * * are that the complainant has an adequate remedy at law. * * *"

At page 993:

> "Under this section it is well settled that it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy*, 3 Pet. 213, 7 L. Ed. 655; *Thomp-*

son v. *Allen Co.,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the act of 1867; for instance, *Grant* v. *Natl. Bank,* 97 U. S. 80, 24 L. Ed. 971; *Rogers* v. *Palmer,* 102 U. S. 263, 26 L. Ed. 164; *Stucky* v. *Masonic Savings Bank,* 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. Under the present act, it has been held that a suit in equity is the proper remedy. *Wall* v. *Cox,* 101 Fed. 403, 41 C. C. A. 408. This was one of the cases which held that the district court had jurisdiction of such suits under the original act, before the decision of the United States Supreme Court in *Bardes* v. *Bank,* 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which established the contrary rule; but the portion of the opinion which relates to the question whether such a suit shall be brought in equity or at law is entirely applicable to cases arising under the amended act.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer upon payment of costs."

It is suggested by petitioners at page 14 of their brief, that

> "Every State Court which has passed on this question has held that the action must be tried at law."

In that connection the Court should examine the decision in *Houghton* v. *Stiner* (N. Y.), 92 App. Div. 171, 87 N. Y. Supp. 10, in which this particular State Court suggested the following:

> "* * * If we are to be controlled by the weight of precedent, we might multiply indefinitely the citation of cases brought in equity wherein relief such as is here sought was accorded. *Schreyer* v. *Citizens' Nat. Bank,* 74 App. Div. 478, 77 N. Y. Supp. 494; *Pearsall* v. *Nassau Nat. Bank,* 74 App. Div. 89, 77 N. Y. Supp. 11; *Bardes* v. *Hawarden Bank,* 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Jones* v. *Schermerhorn,* 53 App. Div. 494, 65 N. Y. Supp. 999; *Stackhouse* v. *Holden,* 66 App. Div. 423, 73 N. Y. Supp. 203; *Perry* v. *Booth,* 67 App. Div. 235, 73 N. Y. Supp. 216."

Recognizing in that case the conflict of authority on the question, Mr. Justice O'Brien made these observations which we submit on principle are controlling (87 N. Y. Supp. at p. 11):

> "* * * Aside, however, from precedents or cases, we think that, *were this an original proposition, the right to maintain in equity such an action as this can be sustained by good and sufficient reasons.* The transfer made by the debtor to the creditor was entirely valid when made, and the title to the property passed to the creditor, together with the right to possession. We do not understand that an action at law could be maintained in trover or replevin by one *who neither had the title to the property nor the right to possession.* It is true that where the trustee elects to avoid the transfer because giving a preference he is entitled to recover the property which has been transferred or its value; but this is quite distinct and different from divesting the creditor of the title and right to possession by the fact

merely that the trustee in bankruptcy elects to rescind the transaction. When such election is signified either by demand or the bringing of an action in equity for an accounting, the creditor then stands in the position of one who holds the title and the right of possession to the property, or its value if sold, as quasi trustee for all the creditors, and as such he can be compelled to account in equity to the one entitled on behalf of the creditors to the property."

At page 12 the Court continued:

"We are not unmindful of the fact that there is no element of fraud in this form of action, and that the theory upon which relief is accorded is, not that the creditor has done anything wrongful in obtaining payment for his debt, because that he could legally do, *but the right is given to the trustee in bankruptcy by statute to set aside such payment* for the purpose of preventing a preference to any particular creditor within four months of the adjudication in bankruptcy. Apart, however, from the question of fraud, thinking, as we do, that *the trustee* with respect to property so transferred to a creditor *is not, by the mere force of his appointment,* invested with the legal title or the right to possession of the property, but that he is permitted in the proper action to regard the transfer *as voidable* at his election, it follows, we think, that the mere fact of electing does not destroy the rules affecting title, ownership, or possession; and as under them the title and right to possession is in the creditor until such time as he either voluntarily surrenders the same to the trustee in bankruptcy or is deprived thereof by a valid adjudication the trustee in bankruptcy is not, at the outset or the beginning of an action, in a position to maintain an action at law either in trover or in replevin. If neither of these

> actions will lie—and they are the only ones at law that can be suggested—then seemingly the remedy of the trustee would be in equity."

Like comment was made by District Judge Lowell in *Reed* v. *Guaranty Security Corporation*, 291 Fed. 580 (D. C. Mass.), the Court holding at page 581:

> "• • • The rule which prevails in this circuit seems to me to be supported by the better reasoning. Bankruptcy is equitable in its nature. *A preference is a creature of the bankruptcy statute, and was unknown to the common law.* It is a technical fraud, and was developed by the equity judges of England (Lowell, Bankruptcy, p. 42 *et seq.*), and did not appear in any statute there until 1869 (id., p. 44)."

This Court has itself on numerous occasions commented upon the equitable features of the Bankruptcy Act, of which the decision by Chief Justice Taft in *Cunningham* v. *Brown*, 265 U. S. 1, is illustrative, this Court commenting (265 U. S. 13) in that preference suit:

> "It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankruptcy law."

At page 4 petitioners suggest "that the principles heretofore enunciated by this Court • • • compel the conclusion that equity has no jurisdiction of such actions. • • •"

It is significant that this Court in a number of instances involving preferences of definite sums of money has on appeal directed the entry of equitable decrees.

See *Cunningham* v. *Brown*, cited *supra*, decided in 1924. Discussing th famous *Ponzi* cases, this Court held (265 U. S. at p. 7):

> "Mr. Justice Taft delivered the opinion of the Court.

> These were six suits *in equity*, brought by the trustees in bankruptcy of Charles Ponzi to recover of the defendants *sums* paid them by the bankrupt within four months prior to the filing of the petition in bankruptcy, on the ground that they were *unlawful preferences.* • • • The actions were tried together in the district court, and were argued together in the Circuit Court of Appeals, and the bills were *dismissed* in both courts • • • (p. 13). It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankruptcy law. Those who were successful in the race of diligence violated not only the spirit, but its letter, and secured an *unlawful preference.* A minor is not exempt (14) from the defeat of an unlawful preference by §*60b* of the Bankruptcy Act, as amended.
>
> The decrees are *reversed.*"

It is of course the fact that in the *Ponzi* cases the right of the plaintiff to proceed in equity was not questioned; however, if petitioners' argument (pp. 4-7) is accepted the defendants' rights to a jury trial have been violated by this Court.

For similar instances in which this Court has approved the entry of equitable decrees declaring unlawful preferences, where a money judgment would suffice see *Hotchkiss* v. *National City Bank*, 231 U. S. 50, and *Mechanics & Metals Nat. Bank* v. *Ernst*, 231 U. S. 60.

The proof in a preference action is highly technical, involving frequently difficult questions of set-off, book proof of insolvency, testimony by expert accountants, witnesses hostile to the trustee, and other features rendering difficult the presentation of the issue in a jury trial. Before the trustee can prevail he must establish a number of statutory re-

quirements, the absence of any one of which vitiates his cause of action.

Collier, 13th ed., Vol. 2, page 1248:

> "* * * Since these amendments a preference consists in a person (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person receiving it or to be benefited thereby has (6) reasonable cause to believe that the enforcement of the judgment or transfer will result in a preference. If any of these elements is wanting, a preference cannot be set aside if otherwise valid under the State law. The burden of proving the existence of the essential elements of a transfer is upon the trustee seeking to avoid it. The practitioner should always have in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subsection b must at least be available. The transfers must, in short, be voidable."

Petitioners at page 15 rely strongly upon *Lewinson* v. *Hobart Service Trust Co.*, 49 F. (2d) 356 (D. C. N. J.) and the English cases therein referred to. The *Lewinson* case and the problem here involved has been recently commented upon in the Columbia Law Review (1931). Discussing that case, it is cogently suggested (31 Columbia Law Rev. 1356):

> "* * * Yet the usual complexity of modern bankruptcy proceedings would seem better adapted to

> a trial in equity, with its special devices for ascertaining the merits of a complicated case, than to one at law. The strongest argument in favor of denying the federal equity jurisdiction, that the express terms of the Judicial Code forbid it, begs the question, for the real issue is whether the remedy at law is in fact adequate."

It is submitted that the language of Judge Holt in *Pond* v. *N. Y. National Exchange Bank* (*supra*) is decisive:

> "That it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is as practical and efficient to the ends of justice and its prompt administration as a remedy in equity"

citing decisions of this Court.

The Bankruptcy Act itself defines a preference as *voidable,* and not void. The transfer stands until declared in violation of the statute; after fixing the elements of a preference the statute declares (§60b):

> "It shall be *voidable* by the Trustee."

The English cases strongly relied on by petitioner, add little to the discussion in view of the language of the statute. Practically all of the cases cited were decided prior to the amendment of 1910 to the Bankruptcy Act, which enlarges the Trustee's rights. The Bankruptcy Act now provides (§47-A-2):

> "* * * and such trustees * * * as to all property not in the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. * * *"

Judge Holt in 1903 referring to an action to recover a preference held:

> "This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance."

In 1910 his views were embodied in statute form to arm the trustee with the "powers of a judgment creditor holding an execution duly returned unsatisfied".

For an extended review of authorities approving of the bringing of a preference suit in equity see *Goodenough* v. *Milliken* (D. C. Me. 1871), 1 Hask. 348, Fed. Cases No. 5535, holding that there are numerous instances in which equity has concurrent jurisdiction. District Judge Fox, reviewing a long list of cases, held (10 Fed. Cas. 593):

> "The allegations in the present bill being, that the rights as set up to the fund or property by the respondents were acquired by them in fraud of the bankrupt act, and the court being called upon by the assignee to so determine, and thereupon to declare them null and void, the case, as I think, is brought within that comprehensive branch of equity jurisdiction of setting aside and vacating conveyances made by a debtor in fraud of his creditors. In such cases, courts of equity grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. Story, Eq. Jur. §190. So far as I am advised, the practice of the district courts of the United States in matters of this nature arising under the present bankrupt act has been in conformity with these views."

Judge Hazel in 1906 in *Parker* v. *Black*, 143 Fed. 560 (D. C. N. Y.) likewise made a review of the authorities

and discussed them concluding that the remedy in equity was permissible (p. 561):

> "In Loveland on Bankruptcy (2nd Ed.), p. 608, the practice is thus stated:
>
> > 'To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy. It must be a plenary suit at law or in equity, according to the nature of the case. Such suits may be actions at law, in ejectment, trover, assumpsit, etc., or suits in equity, as a bill to set aside a fraudulent conveyance.'
>
> In *Bardes* v. *Bank,* 178 U. S. 524, the Supreme Court of the United States, specifically answering the question of jurisdiction certified to them, says:
>
> > 'The provisions of the second clause of section 23 of the bankrupt act of 1898 (30 Stat. 552; U. S. Comp. St. 1901, p. 431) control and limit the jurisdiction of all courts, including several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent against creditors, including payments in money or property to preferred creditors.'
>
> It will be noted that the language employed in the same sentence includes suits to set aside fraudulent conveyances and suits for the recovery of money paid by the bankrupt to third persons. This would seem to indicate that the Supreme Court regarded the payment of money to a creditor or third person in violation of the bankruptcy act as in the nature of a fraud, misrepresentation, or concealment, and that a remedy in equity would more readily afford adequate relief. *Jones* v. *Bolles,* 9 Wall. 364, 19 L. Ed. 734."

POINT IV.

Equity jurisdiction was properly invoked in this case in order to prevent multiplicity of suits.

This suit was commenced on preference causes of action identical except for amounts and dates of transfer against three separate defendants as follows:

Fannie R. Schoenthal (R. 4)	$1,000
Morris Schoenthal (R. 5)	500
Hyman Smith (R. 5)	800

Only the first two were served. They appeared and filed separate answers, making no claim at the time of a misjoinder of parties or that the bill was not cognizable in equity (R. 6, 7). Nor was any demand made at the time for a trial by jury.

The petitioners in this Court claim no error on account of misjoinder of parties, and thereby concede that these parties were all properly joined in this suit. By answering to the merits without protest, the defendants cannot in any event be heard to claim a misjoinder. (See *Barney* v. *Latham,* 103 U. S. 205, 215).

It is obvious that the actions involved common issues of law and fact, both from the record and petitioners' brief, and that, therefore, the defendants were properly joined in the action to prevent multiplicity of suits and to promote the convenience of witnesses pursuant to Rule 26 of the Equity Rules of this Court. (See *Marcus Brown Holding Co.* v. *Feldman,* 269 Fed. 306, 309, and *Jones* v. *Slauson,* 33 Fed. 632, 633.)

It appears, therefore, that the plaintiff's remedy at law was not "plain, adequate and complete" as contended. By virtue of the joinder of parties upon causes of action

which involved relatively small amounts, all of these issues were thereby disposed of in one trial.

A community of interest in the questions of law and fact involved in this controversy is sufficient to justify the exercise of equity jurisdiction to prevent a multiplicity of suits.

> *Commodores Point Terminal Co.* v. *Hudnal* (D. C. Fla. 1922), 283 Fed. 150.

To the same effect see

> *Macmillan* v. *Anderson* (D. C. Iowa, 1922), 282 Fed. 675.

This Court has held that equity jurisdiction will be sustained when a multiplicity of suits will be saved.

> *Oelreichs* v. *Spain* (Dist. Col. 1872), 15 Wall. 211, and
> *Reynes* v. *Dumont*, 130 U. S. 354.

It is submitted that on the facts of this case, no justification appears for burdening the trustee with the hardship and expense of commencing over again at law in three separate suits, issues involving jointly only $2300.

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in disturbing the decisions below.

Respectfully submitted,

GEORGE C. LEVIN,
Attorney for Respondent,
Irving Trust Co., as Trustee
in Bankruptcy of Leonard H.
Smith, trading as Faultless
Sweater Mills, bankrupt,
225 Broadway,
New York, N. Y.

SYDNEY KRAUSE,
GEORGE J. HIRSCH,
Of Counsel.